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Professionals and partisans: Lessons for family lawyers from a study of fee-charging McKenzie Friends

Leanne Smith and Emma Hitchings*

Abstract

This article seeks to shift the focus of recent debates around the work done by fee-charging McKenzie Friends in some family law disputes. It takes some key findings from a study of fee-charging McKenzie Friends conducted by the authors and situates them in the context of two bodies of literature: first, work exploring challenges to traditional legal services made by non-lawyers; and secondly work exploring the practices of family lawyers. Through an analysis of the services offered by fee-charging McKenzie Friends (the 'partisans' of our title) and the views of their litigant in person clients, we argue that the service offered by many McKenzie Friends appears to contrast with aspects of the services offered by lawyers (the 'professionals') that have been recognised as problematic in family law for decades. This presents a challenge for family law practitioners, policy-makers and researchers – namely, to reflect on whether the appeal of fee-charging McKenzie Friends highlights a need to address some long-recognised shortcomings in the support that family lawyers are able to offer to their clients.

Keywords: McKenzie Friends; family lawyers; non-lawyers; professionals; partisans; family disputes; emotional and legal support

Introduction (A)

> 'In law (as in medicine) one may observe some resistance to the exclusively professional definition of problems and control of services. There is a growing recognition that the treatments which are offered may create more problems than they solve. Accordingly, we see growing up alongside these professions various fringe groups which, whilst they struggle for acceptance and recognition, seek to avoid some of the defects of more established systems. Typically, these services will draw rather more on the resources of the patient/client and less on the expertise of the "treater".'[1]

> 'The legal system in family law is no more than human disagreement – there are no legal questions… it is an irrebuttable truth that family law doesn't need lawyers.'[2]

* University of Exeter and University of Bristol respectively. The authors would like to thank the anonymous reviewers for their extremely helpful comments. The research study used in this article was funded by The Bar Council. The views expressed, along with any errors, are those of the authors.

[1] G Davis, *Partisans and Mediators* (OUP, 1988), 208.

[2] Director of McKenzieFriendsUK, as quoted in M Walters, *'Family law "does not need lawyers" claims ex-policeman's McKenzie startup'* (Law Society Gazette, 3rd January 2019).

The words of Gwynn Davis that appear in the first quote above will no doubt be familiar to some readers, though they are now over thirty years old. They serve as a reminder that the work of family law practitioners has long been vulnerable to challenge by 'fringe groups' asserting competence in family dispute resolution even as they 'struggle for acceptance'. Davis was writing against a backdrop of rapid growth in 'new mediators' providing help for family disputes. These mediators, Davis concluded, did not pose an existential threat to family lawyers. Rather, he speculated that the inherently partisan nature of lawyers' support, combined with their expertise, shored up their future against the oncoming tide of mediators. He explained this view memorably:

> 'When the parties are at their most vulnerable – in conflict with one another and confronted with legal machinery which they do not understand – the only 'support' worth having may be that which is unashamedly partisan. … partisanship is what many people feel they need when they are under threat.'[3]

The partisanship described by Davis alluded to the benefit of legal representation in an adversarial system, in which advancement of the interests of a client is central to the work of the lawyer. Nonetheless, he did note that mediation was taking hold in the broader context of delegalisation and a 'legitimation crisis' in the form of 'expressions of dissatisfaction' with family law practice and the formal legal process.[4]

On a policy level, scepticism related to the value of family law and family lawyers, in part derived from assumptions about the impact of the adversarial system and partisan representation, has continued to sustain a project of delegalisation. This project arguably reached its apotheosis with the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which removed almost all private family matters from the scope of legal aid, proffering mediation as an option superior to the advice of a qualified lawyer.[5] The strong growth in mediation that was anticipated following LASPO has not manifested,[6] but to the extent that self-representation in the courts is now the norm, the role of family lawyers has undoubtedly diminished.[7] Twinned with

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[3] Davis, n 1 above, 90.
[4] Davis, n 1 above, 2.
[5] This policy preference can not only be highlighted through MIAMs (Mediation Information and Assessment Meetings), which are now compulsory for individuals who wish to make a private family law court application (Children and Families Act 2014, s 10), but through official documents in the run-up to LASPO. For example, Ministry of Justice, *Reform of legal aid in England and Wales: The Government response*, Cm 8072 (2011), 4.
[6] The number of publicly funded MIAMs fell from a peak of 31,336 in 2011/12 to 10,497 in 2018/19. The number of publicly funded mediation starts fell from 15,357 to 6,515 over the same period. See *Legal Aid statistics tables January to March 2019*, Tables 7.1 and 7.2, available at: https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2019, last accessed 30 September 2019.
[7] In 2018, neither applicant nor respondent had legal representation in 37% of all private law children disposals, compared with 13% in 2012. By contrast, in 2018, both parties were represented in 20% of all private law children disposals, compared with 45% of cases in 2012. Authors' calculations based on *Family Court statistics quarterly. Family court tables: January to March 2019* (MoJ), 2019), table 10. Available at: www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2019, last accessed 30 September 2019.

a proliferation of unregulated advice providers online,[8] this trend means that the need for family law practitioners to demonstrate distinctive capabilities has never been stronger.

This brings us to the second of our opening quotes, which raises the stakes, branding the work of family lawyers as completely redundant. It comes from a member of a newer 'fringe group' of service providers for family disputes that certainly 'struggles for acceptance': namely, fee-charging McKenzie Friends. McKenzie Friends – lay supporters who accompany unrepresented litigants in court – are not a new phenomenon. The prima facie right of litigants to use them has been recognised for decades.[9] Typically the role entails giving informal support in the courtroom (eg notetaking, quietly advising) on a one-off basis, usually to someone known personally. However, some individuals operate as 'professional' McKenzie Friends, charging a fee for their support. Such individuals are most prevalent in the area of family law and tend to provide services that go beyond quiet courtroom support. One augmentation of the role relates to McKenzie Friends seeking permission to exercise rights of audience (ie to address the judge and speak on behalf of the litigant in court). Other tasks include giving legal advice outside of the court and helping litigants to prepare paperwork. Unregulated, unaccountable and usually lacking formal legal qualifications, professional McKenzie Friends have not been welcomed by the legal professions. Fear that their numbers are expanding, particularly post-LASPO, even prompted a consultation on proposals to prevent McKenzie Friends from charging a fee for work in court.[10] Concerns relate to: risk of poor advice, combined with lack of regulatory protections for clients of McKenzie Friends; the potential threat to the efficient administration of justice (due to inexperience, lack of knowledge or obstructive behaviour); and the apparent prevalence of agenda-driven McKenzie Friends whose practice need not be moderated by a duty to their clients or to the courts.[11] The cited quote, which lacks accuracy and measure, is likely to activate the alarm of those who have researched, taught, studied or practised family law, providing vindication for anti-McKenzie Friend views.

Notwithstanding the concerns, in this article we suggest that the work of fee-charging McKenzie Friends, and even the exaggerated charge contained in the example quote,

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[8] See Legal Services Board, *Mapping of for profit unregulated legal services providers*, 28 June 2016, 10 which provides an indicative market share of for-profit unregulated providers by sector. Available at: www.research.legalservicesboard.org.uk/wp-content/media/Mapping-unregulated-providers.pdf, last accessed 30 September 2019. Relevant discussion is also provided by M Maclean and J Eekelaar, *After the Act: Access to Family Justice after LASPO*, (Bloomsbury Publishing, 2019) and L Webley, 'When is a Family Lawyer, a Lawyer?', in M Maclean, J Eekelaar and B Bastard (eds), Delivering Family Justice in the 21st Century (Hart Bloomsbury, 2015) 305-321.

[9] The term 'McKenzie Friend' derives from the case of *McKenzie v McKenzie* [1971] P 33.

[10] Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: a consultation* (2016). A response to the consultation was published in 2019, recommending that no changes be made at this time but reiterating that the Judicial Executive Board remained 'deeply concerned' about professional McKenzie Friends. Lord Chief Justice of England and Wales, *Reforming the courts' approach to McKenzie Friends: Consultation Response*, (Feb 2019), 3. Both documents available at: www.judiciary.uk/publications/consultation-reforming-the-courts-approach-to-mckenzie-friends, last accessed 30 September 2019.

[11] See Legal Services Consumer Panel (LSCP), *Fee-charging McKenzie Friends* (2014) chapter 4 for a discussion of many of the risks associated with McKenzie Friends. Available at: www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf, last accessed 30 September 2019.

should prompt reflection on the part of family law practitioners. The article combines data from the authors' qualitative interviews with fee-charging McKenzie Friends and clients of fee-charging McKenzie Friends with an extensive body of existing research-based commentary on the practices of family lawyers. We begin with a brief outline of the methods behind the interview data. Following this, in the second section we add some interpretive context to the second of our opening quotes, noting the myriad ways in which the need for professional family lawyers has been contested and the consequent need for a reflexive approach to their practice. We then outline claimed distinctions between the practices of McKenzie Friends and family lawyers that were highlighted in the course of our study. Finally, we show that these distinctions resonate strongly with the findings of numerous studies on the working practices of family lawyers. Throughout the discussion, we highlight a range of ways in which family law practitioners appear to fall short of the expectations and needs of some litigants. In particular, we argue that many McKenzie Friends seem able to provide the partisanship that Davis deemed essential to those seeking support with family breakdown more convincingly than family lawyers, whose professionalism might – paradoxically – even operate to obstruct it. Furthermore, we suggest that nurturing the ability to connect with a client over a family law issue might be the key to demonstrating and sustaining the value of family lawyers. Far from seeking to vindicate the view that there is no need for family lawyers in law, our objective is to highlight a potential strategy for the unravelling of that myth through action on the part of family lawyers.

Unless stated otherwise, it should be assumed throughout the article that 'McKenzie Friend' refers to a fee-charging McKenzie Friend. The term 'lawyer' should be taken as a reference to either a practising solicitor or barrister, though it will be clear to readers that the issues discussed relate more to the former than the latter.

A NOTE ON THE RESEARCH DATA (B)

This article draws on data that formed part of the study of fee-charging McKenzie Friends in private family cases conducted by the authors in 2017. The study took place against a backdrop of scant research on the topic. In 2014, a small-scale study by the Legal Services Consumer Panel canvassed views on the risks posed by McKenzie Friends by means of interviews with McKenzie Friends, web searches and a call for anecdotal evidence from stakeholders such as judges.[12] The LSCP report concluded that there was little evidence to substantiate concerns about the threats posed by McKenzie Friends and that they ought to be accepted 'as a legitimate feature of the evolving legal services market'.[13] However, the study did not address the views of McKenzie Friend clients and the report itself presented very limited data, making the reliability of the conclusion a matter of conjecture. Trinder et al's study of litigants in person in private family cases encompassed detailed analysis of the work of three paid McKenzie Friends that comprised observation of a case hearing, follow-up interviews with the litigant, McKenzie Friend and involved legal professionals, and scrutiny of the relevant court case file. The work of the McKenzie Friend was found to be extremely positive in one case but concerning in the other two.[14]

[12] LSCP, n 11 above.

[13] LSCP, n 11 above, para 5.7.

[14] L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series, 2014), 93-98, available at:

Our study sought to explore two knowledge gaps: the lack of data on the perspectives and experiences of the clients of McKenzie Friends; and the paucity of information on how McKenzie Friends approach work inside and outside of court. The research comprised in-depth semi-structured interviews with 20 fee-charging McKenzie Friends and 20 former clients of McKenzie Friends. A separate component comprised observation of hearings involving McKenzie Friends at five family courts, purposively selected on the basis of their high volumes of private family cases, and – where possible – associated further interviews with those involved. Although the study did not extend to measuring the outcomes of McKenzie Friend work, or objectively evaluating its quality, some inferences on competence were drawn from hearing observations and from responses to a vignette. A full report of the findings has been published by the Bar Council, which commissioned and funded the study.[15] In a nutshell, we found that the working practices and motivations of McKenzie Friends are often (if not always) more benign than is assumed and that most appear able to provide support that is likely to improve an unrepresented litigant's ability to handle proceedings. To date, the study provides the most detailed snapshot of the work of professional McKenzie Friends.

This article draws only on the interview data, honing in on insights into why people might like McKenzie Friends that were considered only briefly in the report. Neither the McKenzie Friend nor the client interview sample was randomly generated. The former was purposively selected based on information available online (websites, rather than social media), with efforts made to ensure balanced representation of a range of characteristics including gender, background, fee charged and experience level.[16] That sample was supplemented by interviews with a further four McKenzie Friends that were obtained following court hearing observations.

The client sample proved difficult to generate. Our initial strategy of leaving information and requests for participants at courts and with the Personal Support Unit and Citizens' Advice Bureaux yielded only one interviewee. Consequently, we resorted to other recruitment channels, including the mailing lists and /or social media accounts of OnePlusOne, Only Mums and Only Dads, and the Pink Tape legal blog. Four interviewees reported hearing about the study via those routes. Fifteen interviewees were generated by sources that would be expected to have a pro fee-charging McKenzie Friend leaning.[17] A further six client interviews were generated following hearings observed at court. Overall, therefore, our client sample is likely to be biased towards those with broadly positive experiences of fee-charging McKenzie Friends but 11 out of a total 26 client interviews were obtained through relatively neutral sources. Irrespective of the bias within the sample, the interview data provide insight into the issues at the heart of this article: what some litigants like about fee-charging McKenzie

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf, last accessed 30 September 2019.

[15] L Smith, E Hitchings and M Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (The Bar Council, 2017), available at: https://www.barcouncil.org.uk/media/573023/a_study_of_fee-charging_mckenzie_friends.pdf, last accessed 28 September 2019.

[16] For further detail and discussion of the study's methodology, ibid.

[17] This included interviews generated by McKenzie Friends or organisations associated with McKenzie Friends who had picked up the request from more neutral referral agencies on social media and shared the details of the study with their clients or members.

Friends, why they choose them over lawyers, and perceptions of what McKenzie Friends do that family lawyers cannot or do not do.

As noted in the original report, fee-charging McKenzie Friends are a relatively small population and cases involving them form a very small proportion of family cases. To avoid inadvertently revealing the identities of those involved in the study the decision was taken not to attach any identifiers to quotes. The same approach is taken below. Prior to the findings being published, two academic reviewers[18] were given access to more details and confirmed that a full spectrum of the data we gathered was fairly represented in our analysis.

Challenges to the expertise of family lawyers (A)

The view that there is no law in family law, and therefore no need for family lawyers, is one that was echoed in a number of our interviews with McKenzie Friends.

> '[Family law] is a very straightforward process. And procedure driven with very little law in it at all.'
>
> 'An employment tribunal is very complex - the law is very dynamic. In contrast the law in family law hearings is not complex at all.'
>
> 'A significant part of what I am doing is supporting parents to be able to step outside their anger or frustrations or bad feelings and look at how they can achieve something better for their children. And quite a substantial amount of that is not to do with law. It's to do with understanding conflict.'
>
> 'It's not that complicated, I think. In fact, I think family matters are very *un*complicated law.'

Vexing though these sentiments may be, in this section we offer two reasons for restraining criticism of those who expressed them. First, the charge that there is no law in family law and no need for family lawyers should be seen as predictable rather than surprising, for it is a prime example of what Moorhead, Paterson and Sherr have termed 'contesting professionalism'.[19] Incursions into the traditional domain of lawyers have been made by non-lawyers for some time, and in many areas.[20] Writing of the characteristics of such incursions, Moorhead et al observe the existence of a 'professional paradigm' and a 'paraprofessional paradigm' within which the respective value of the work of lawyers and non-lawyers tends to be framed. They note that there is considerable overlap between the claims made within each paradigm, with non-lawyers tending to assert similar competencies to lawyers before going on to assert a 'useful difference' that implicitly problematizes some of what lawyers do while

[18] Mavis Maclean and Professor Alan Paterson.

[19] R Moorhead, A Paterson and A Sherr, 'Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales', (2003) 37(4) *Law and Society Review*, 765. Though it might be retorted that the predictability does not equate to acceptability, it is worth noting Moorhead et al's conclusion that there is little evidence that paraprofessionals perform less well than professionals when it comes to various types of legal advice (see 794-796).

[20] McKenzie Friends have been around for a long time but are just one example. More mainstream are Citizen's Advice Bureaux and mediation services. See Webley, n 8 above, and Moorhead et al, n 19 above. The latter includes a summary of extensive literature on nonlawyers.

supposedly elevating the value of the non-lawyer approach.[21] In line with this analysis, downplaying the necessity and specialist nature of family lawyers' expertise, serves to establish the foundations for equal competence for McKenzie Friends – the paraprofessionals of this context. Below, we outline and reflect on the 'useful differences' asserted by the McKenzie Friends in our research sample. Before that, however, we wish to highlight a second reason for adopting a measured response to attacks on the value of family lawyers.

McKenzie Friends are far from alone when they assault the expertise of family lawyers; one does not have to look far to find that their views resonate with those expressed by far more authoritative sources. Most notably, the need for lawyers to help resolve family disputes has been widely contested through decades of policy rhetoric that can be traced back to at least the early 1990s. Indeed, John Eekelaar et al's late 1990s study of the divorce work of solicitors was carried out for the precise purpose of interrogating the validity of claims that family lawyers were too expensive and too litigious. As noted in the introduction to that study, such claims were used to support the marginalization of lawyers in proposals for divorce reform that culminated in the failed provisions of Part II of the Family Law Act 1996.[22] Under the cloak of allegations that family lawyers increase cost and conflict, the provisions placed a strong emphasis on the advantages of mediation over the legal process and sought to divert individuals away from courts and lawyers. The provisions were not implemented, in part because, when piloted, they did not generate high levels of participation in mediation or deter divorcing couples from using lawyers.[23] However, the promotion of mediation as superior to lawyer-guided settlement continued under the Blair Government.[24] Writing at the time, Eekelaar et al observed that the policy position 'takes it as given that lawyers disrupt harmony' and concluded that 'the determination to reduce the role of lawyers in divorce could not be made more evident'.[25]

Though much evidence counters the assumption that lawyers 'disrupt harmony',[26] that determination was expressed in the strongest terms through LASPO, which again sought to de-centre lawyers and amplify the role of mediators in resolving family disputes.[27] Since LASPO, Anne Barlow et al have highlighted the problematisation of

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[21] Moorhead et al, n 19 above, 768.

[22] Eekelaar et al demonstrate how rhetoric around the cost and conflict inflicted by lawyers appeared repeatedly in such documents as, *Looking to the Future: Mediation and the Ground for Divorce: A Consultation*, Cm 2424 (1993) and the subsequent White Paper, *Looking to the Future: Mediation and the Ground for Divorce*, Cm 2799 (1995). See J Eekelaar, M Maclean and S Beinart, *Family Lawyers: the divorce work of solicitors* (Hart, 2000), chapter 1.

[23] See Newcastle Centre for Family Studies, *Information Meetings & Associated Provisions within the Family Law Act 1996: Final Evaluation of Research Studies* (London: Lord Chancellors' Department, 2000), referenced in C Fairbairn, *House of Commons Briefing Paper Number 01409: No-fault Divorce* (House of Commons Library, 29 September 2016), available at: https://www.familylaw.co.uk/docs/pdf-files/house_of_commons_no_fault_divorce_briefing_paper.pdf, last accessed 30 September 2019.

[24] See Eekelaar et al's discussion, n 22 above, 6-7. In particular, they cite passages from Home Office, *Supporting Families: A Consultation* (1998).

[25] Ibid, 9.

[26] Eekelaar et al (n 22 above) demonstrated that family lawyers invest heavily in conflict reduction strategies and Rosemary Hunter has provided a sharp rebuttal of 'adversarial mythologies' using evidence from the UK and Australia to demonstrate the extent to which family law practitioners seek to achieve consensual agreement: R Hunter, 'Adversarial mythologies: policy assumptions and research evidence in family law' (2003) 30(1) *Journal of Law and Society* 156.

[27] This focus is also reflected in current procedure, being noted in the Child Arrangements Programme (CAP), Practice Direction 12B, especially paras 2.2, 5.1, 5.3, 6.1, 6.2, 6.3 and 6.5.

family lawyers on the twin axes of cost and conflict in a range of official materials targeted at those experiencing family disputes. These materials, they say, 'rely on anti-lawyer and anti-court stereotypes, eg referring to "big legal fees" and "long drawn-out court battles"'.[28] Of course, the counterpart to the denigration of lawyers has been lauding of the benefits of consensual and autonomous decision making through mediation, or other types of private negotiation. Private dispute resolution has been promoted, and latterly all but mandated,[29] culminating in the seemingly paradoxical situation in which family law procedure is explicitly designed to divert individuals away from lawyers and the law. To borrow the words of Alison Diduck, family justice policy has created a milieu in which 'the law is anathema to family problems' and 'it makes sense that lawyers are demonised formally'.[30]

The message emitted on a policy level has a certain 'common sense' appeal.[31] It is by no means obvious that the emotional intricacies and intensely personal context of a relationship dispute should lend themselves to legal solutions. Neither is it clear that advice on navigating relationships and conflict falls naturally within the lawyer's skillset. As such, ambivalence about the role of family lawyers has also been expressed, or at least validated, by researchers. In their US study of the practices of family lawyers, Lynn Mather et al observed 'the limited relevance of technical legal knowledge to the work of divorce law',[32] describing divorce lawyers as 'especially vulnerable' to attacks from rival service providers 'because it is difficult to claim their skills as either esoteric or exclusive'.[33] In England and Wales meanwhile, Davis noted that much of what family law solicitors do to ameliorate their clients' distress 'is the very stuff of social work'.[34] And Eekelaar et al captured the view that family lawyers' expertise is not unique, noting that 'a person can ask anyone to help resolve a conflict', and that 'others, such as mediators, may claim a competing role in using the knowledge to achieve the same results sought by lawyers'.[35] Most recently, Maclean and Eekelaar have suggested that their 'observations on the importance of addressing [family] problems wider than those that concern the application of law could also be seen to contribute to a general de-emphasis on the role of the law in these matters'.[36]

In light of all this, the suggestion that there is not much law in family disputes, and not much need for family lawyers seems less preposterous. What it does do is expose the vulnerability of family lawyers to the charge that they are not necessary; McKenzie Friends might well make tactical allegations to establish a basis for asserting competence equal to that of family lawyers, but they do so in an environment that is well primed to accept their assertion. This brings to mind Alan Paterson's view that challenges to legal professional monopolies can function constructively to reshape

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[28] A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice: Briefing paper and report on key findings* (University of Exeter, University of Kent and ESRC, 2014), 32.
[29] See the CAP provisions that emphasise ADR (n 27 above) and n 5 above regarding the statutory provision requiring attendance at a MIAM other than in cases involving domestic violence.
[30] A Diduck, 'Autonomy and family justice' [2016] 28(2) *Child and Family Law Quarterly* 133-149, 142.
[31] Of course, there might be a circularity to this in that the 'common sense' view both informs and derives from the policy emphasis on the superiority of private dispute resolution.
[32] L Mather, C McEwen and R Maiman, *Divorce Lawyers at Work*, (OUP, 2001), 14.
[33] Ibid, 66.
[34] Davis, n 1 above, 88.
[35] Eekelaar et al, n 22 above, 182.
[36] Maclean and Eekelaar, n 8 above, 175.

and reinvigorate professional practice.[37] The context and manner in which McKenzie Friends set out their stall could serve as a prompt for family lawyers who wish to find ways of asserting and ensuring their value into the future. After all, while we should not exaggerate the vulnerability of family lawyers,[38] their appeal cannot be taken for granted at a time when it is harder than ever for many individuals to access them. The value of the partisanship and expertise that Davis argued would protect family lawyers has been directly undermined through rhetoric and procedure that equates partisan representation with heightening, rather than resolving, conflict and values private, or mediator-led, dispute resolution over legal advice.

In the sections that follow, we outline how our findings reveal challenges to the way that family lawyers do things that family law practitioners might do well to heed.

Perfect partisans: the 'useful differences' claimed by McKenzie Friends and their clients (A)

It is unsurprising that McKenzie Friends should project a view of their work that is differentiated from lawyers.[39] It is equally unsurprising that they should assert higher levels of client care and commitment to solving the client's problem. This is precisely what we found in our McKenzie Friend interviews. Themes that emerged around asserted differences from lawyers were reinforced by the views expressed in many client interviews.

A FRIENDLY ALLY (B)

One of the many ways in which McKenzie Friends emphasised their commitment to caring for the client was by describing an empathetic approach that was sensitive to the emotional dimensions of family disputes. Almost every McKenzie Friend we spoke to highlighted emotional support as an element of their work and a number appeared to consider that attending to the client's emotional needs was *central* to what they did:

> 'Something that I think that would set a McKenzie Friend, or certainly would set me apart … I offer a huge amount of emotional support. Actually, I think it's very much under-dealt with in that you know and I know from personal experience, you know people whose world has – or they feel their world has – just fallen apart … And sometimes you really have to sit them down and

[37] A Paterson, 'Professionalism and the legal services market' [1996] 3 *International Journal of the Legal Profession* 137.

[38] Notwithstanding years of policy rhetoric and action designed to promote mediation, people experiencing family problems are still far more likely to use a formal resolution process and/or access legal advice than are people experiencing civil or administrative problems. R Franklyn, T Budd, R Verrill and M Willoughby, *Findings from the Legal Problem and Resolution Survey 2014-15* (Ministry of Justice Analytical Series, 2017) 37-38, available at: www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/596490/legal-problem-resolution-survey-2014-to-2015-findings.pdf, last accessed 30 September 2019.

[39] Interestingly, the above discussion on this point puts Angela Melville's critique of McKenzie Friends' tendency to denigrate the courts and family lawyers into perspective. Viewed within the wider context of a range of nonlawyer practices, this tendency looks less remarkable. A Melville, 'Giving hope to fathers': discursive constructions of families and family law by McKenzie Friends associated with fathers' rights groups' [2017] 31(2) *International Journal of Law, Policy and the Family* 147-173.

say “look, you’re going to be ok, you know the courts are not ideal for dealing with family situations but actually they’re there to help you”.’

‘It’s a quality that I think people should look for in a McKenzie Friend – that somebody should be able to support them in the most calm and centered kind of way as possible… it takes quite a considerable amount of time, flexibility and skills to understand and support litigants in person.’

Our interview sample included two former family law solicitors who had shifted to McKenzie Friend work[40] and it was striking that one of them also explained her approach with reference to the personal needs of a particular client:

‘Her husband had left her and she was still in shock. … She needed someone who wasn’t, who was going to care, that’s what she needed, and I think that’s why she stuck with me. She could see that I was more interested in helping her than I was about the fee.’

The sense that the McKenzie Friend really cared about the client and the case came across strongly in a number of client interviews:

‘[MF] made me feel that my son was the most important thing and she was fighting for him as much as I was.’

‘I loved her… She was very pragmatic. She was very caring. And she wasn’t angry… she was on my side but not judgemental about him.’

‘[MF] seemed to be more of a friend than I could imagine during those days, and I was able to cry on his shoulders …’

‘I found him to be better than the solicitor I previously used, and he’s very thorough. He takes a personal interest in the case. It’s not just business for him. It’s a principle thing, and he believes in you.’

It was clear that a majority of the clients interviewed highly valued the strong feeling of personal support they had obtained from their McKenzie Friends. The empathetic approach of some McKenzie Friends undoubtedly contributed to this. For some, the feeling was intensified by a sense of connection as a result of the McKenzie Friend’s past experience.

‘I think one of the things that impressed me is that he had gone through a divorce about the same time as I had and that he had come into this… [to] try and help people’

‘The ones I have used and that I’ve come across all seem to be in the same position as myself… well they actually know how I feel, to a degree.

[40] Reported reasons for making such a move are discussed in the report, n 15 above, 15-19, and included work/life balance concerns and principled frustration at legal fees and levels of unmet legal need.

> Whereas the solicitors, 'we don't care about you, we're just after your money, we're running a business'.'

The interview data suggested a further explanation for the feeling of connection with McKenzie Friends that many clients described; the relationship was often characterised as relaxed and informal. Consequently, clients reported feeling very comfortable in the presence of their McKenzie Friend, often contrasting this with their experience of dealing with legal professionals.

> '[W]hen I went for my interview at the solicitor's I felt a bit intimidated, and I wasn't really sure. I just felt like I was feeling silly for asking little silly questions, where with [McKenzie Friend] I can talk to her and I can ask her anything. I do feel more comfortable…'

> 'The danger with my lawyer is, the more the case goes on, the more I end up using him like a counsellor… It's a very costly mistake. Whereas McKenzie – you kind of can use them like that. It's far more like chatting to a mate and then your mate suddenly becomes a lawyer, if you know what I mean.'[41]

> 'He is your mate as well … so at the end of the day you go you know you go to the pub afterwards and you have a drink and you can just let it all out properly.'

> 'I found [McKenzie Friend] much more user friendly and much more accessible. … It was a much more relaxed relationship.'

Again, some comments from McKenzie Friends resonated with those of the clients on this issue. One former solicitor spoke strikingly of her compassionate approach with clients who 'had been scarred by the coldness of the solicitor' before coming to her. Another former solicitor said,

> 'I used to, you know, have clients come in to see me in the solicitors' firm who were clearly kind of very nervous, even the whole prospect of turning up at a firm of solicitors and, "how have I ended up in this situation of having to go to a solicitor?". And, you know, that's a pretty horrible thing, a daunting thing, and I didn't want for clients to feel like that. I wanted for clients to feel that it was kind of a very personal, you know, supportive role.'

Overall, it seemed that the friendliness and empathy of many McKenzie Friends adds an affective dimension to the support they provide – one that is perceived to be distinctive by those able to draw a comparison with using a solicitor. For many litigants, this could equate to a perception of having a real ally in their case.

A DEDICATED SUPPORTER (B)

Holistic and attentive support (C)

[41] In his discussion of the many roles that a family solicitor fulfils, Davis examines the 'counsellor' element; Davis, n 1 above, 88-92.

Our research report notes that the out-of-court work provided by McKenzie Friends is far-reaching and practically oriented.[42] It includes such tasks as managing a client's expectations, assisting with paperwork, advising on options and potential outcomes and supporting settlement. In many respects, this apes the work undertaken by solicitors and is notably consistent with Moorhead et al's observation of overlap in the claims to usefulness by 'professionals' and 'paraprofessionals'. However, a client-centered 'difference' in McKenzie Friends' approach was revealed first in the scope of the practical support they provided, and secondly in the manner of providing it.

In terms of scope, McKenzie friend and client interviewees emphasised the holistic nature of support that was being offered, drawing attention in particular to the combination of practical support with the emotional support noted above. But there were also references to a broad-spectrum approach that encompassed support with issues that were related to the family dispute but distinct from the legal proceedings. This ranged from practical support in working out how a client whose benefits had been stopped could get to court to advice on dealing with a child's school:

> 'I helped him write letters to the school, the school were avoiding his letters and his emails, not answering him so I gave him some correct wording to tell them about parental responsibility and what they are obliged to do and not to do.'

A further element of the practical support provided appeared to be particularly valued by clients in our study. Namely, consistent and proactive efforts to explain what was going on with their case in a way that they could understand.

> '[T]he solicitor I used previously, she'd never really gone into or tried to paint the kind of detail that [McKenzie Friend] does. You just get the feeling that she's got so many other cases on her plate, which is probably often the case, and it just felt very impersonal.'

> 'One of the big things I didn't like about using a solicitor was that there is no transparency, they don't tell you what's going on, they don't give you the paperwork and you get a bill at the end of the month and you've no idea what they've been doing. With the McKenzie Friend … they're much more open and frank with you about what's going on and the way you need to approach it.'

> 'The solicitor had not explained the process either. So this was a preliminary hearing – we didn't understand any of that. We thought it was a proper court case that day, going to the Children and Family Court. We thought that was it – decisions would be made. My daughter came back absolutely devastated. … [McKenzie Friends] answered our questions when nobody else seemed to be able to answer them; they explained the process; they explained what was needed.'

[42] n 16 above, chs 3 and 4.

Of course, it is possible to read this attentiveness as an extension of the emotional support that McKenzie Friends appear to prioritise – clients are likely to derive a degree of reassurance and confidence from being 'kept in the loop' about their case.

Flexible and available (C)

A further example of the client-centered ethos of McKenzie Friends was found in reports of an approach to client care and case management that prioritised flexibility in terms of when and how clients could access them. A characteristic of this flexibility was willingness to meet clients outside of traditional office hours and environments.

> 'I am happy to meet with people, you know, sort of early evening as well because obviously it's not always easy for people to get out of work to go to see a traditional firm of solicitors in their hours. So, you know, clients will text me and say are you around for a chat, and I will text back and say … 4 o'clock, so it's a kind of much more sort of, well hopefully, modern and user-friendly service.'

In addition to making use of online and telephone communications, many McKenzie Friends and clients spoke of meeting in mutually convenient locations such as pubs and coffee shops.

Clients' comments on flexibility indicate that it was not just adapting to the needs of the client in terms of accessibility that was valued, but also providing a very rapid response.

> 'I can just email her any time of the day or ring her any time of the day… I've always felt she's on the end of the phone. … and I don't feel, probably, with a normal solicitor I would be able to do that, because I would have to go through the secretary, probably have a meeting which would costs me loads anyway and have to wait probably a week,'

> 'I feel it offers flexible support … and a quicker response. You can do lots of things more quickly because firstly they aren't dealing with lots and lots of cases. I think my McKenzie Friend he would have a few cases on the go at a time and was usually able to respond within 24 hours.'

> 'All the correspondence was quick and each time I sent an email he [McKenzie Friend] would respond literally the next morning'

Here, two clients hint at the ability of McKenzie Friends to respond rapidly to queries as a consequence of holding only a light caseload at any given time. Another benefit of this was revealed in comments from clients who asserted that their McKenzie Friends had managed their cases far more proactively than solicitors had done:

> 'So you know: solicitor, eight weeks nothing happened. Talking to a McKenzie Friend: within five weeks I am back in my children's lives.'

> 'I could literally bounce emails off the McKenzie Friend and he would come back with very reasoned answers within a really short time-frame, which

> really takes all the stress out of it for me. With solicitors I found I was waiting for … well, up to seven weeks on one occasion for a reply, and with my wife getting agitated in the background, it really did stir up hostility. She was accusing me of dragging my feet and I was accusing her, and it wasn't anything of the sort – it was the solicitors exchanging letters and not actually doing anything for ages.'

It appeared from our study that the comfortable relationship that clients experienced with their McKenzie Friends was only reinforced by what many considered to be a very dedicated approach to client care and case management. The result was a perception not just that clients had an ally in spirit, but that they had a supporter who could be relied upon and trusted.

AFFORDABILITY (B)

The attentiveness described above would be of little use if it came with a hefty price tag. But one of the key themes emerging from our interviews was the affordability associated with using a McKenzie Friend; most clients reported spending less than £1000 in total (almost all had concluded their cases before agreeing to an interview). In several instances this covered support at more than one hearing together with associated preparation and paperwork, as well as time given to the client that was not charged at all. The following quote highlights an affordable hourly rate as well as work undertaken for free. It also speaks to one of the 'useful differences' identified earlier: the informal and personal relationship between a McKenzie Friend and client that contrasted with the necessary distance associated with a regulated legal professional.

> 'And I think the solicitor wanted £180 an hour and [McKenzie Friend] wanted £30 an hour…. I think probably [McKenzie Friend] might have taken a couple of hundred quid off me in total for his time but … we are connected on social media sites and stuff like that so we'll have a few bits of dialogue through that, you know, and from time to time I will give him a ring and have a chat to him. So, yes, I probably get quite a lot of free time.'

It appeared that, although many McKenzie Friends charged a headline hourly rate, their charging practices did not adhere rigidly to those rates. Such flexibility is not necessarily positive as it could result in uncertainty for clients. However, among our sample it appeared to result in overall costs that were considerably lower than solicitor costs. By contrast, one ex-solicitor McKenzie Friend expressed misgivings about the charging frameworks they had experienced while in practice, in particular noting that charging in six-minute units of time can result in a rapid escalation of costs:

> '[T]he client had sent an email in and [another solicitor] read an email and the email was about three lines and she'd charged two units of time, one to read it and one to draft a file note to say she'd read it. And they're the kind of practices that no amount of regulation by the SRA captures because spending time reading a file note, even if it is three lines, you charge in six-minute units. That means it's six minutes, that's a legitimate cost. Drafting a file note to say you've read it is also another six minutes. So to actually read the three line email the client is getting charged for 12 minutes of time at an hourly rate of £220.'

The following client described experiencing this approach to charging from the other side of the desk:

> 'when I went to the solicitor, in one month, they billed me for, I think it was for about nearly £4,000 – £3,800. … I asked for – to explain how can that be possible, this much money, when my court case has not even gone to the court stage. They gave me a breakdown, – and probably at least 60% I agree with, like, attending in their office when they took a statement off me and when they called me. Some of the things were ridiculous, because the solicitors called me to get some information about my doctor's address, and I noticed she even billed me for that phone call… some of the charges I didn't recognise.'

Many others had felt sceptical about the value of the service they received:

> 'I think I spent something like £27,000 on a solicitor and he kept telling me that he was trying to keep my costs down but we didn't seem to be getting anywhere so I eventually got rid of my solicitor.'

Another former solicitor McKenzie Friend commented on how high fees had the potential to deter the clients from communicating with their lawyer when they needed to:

> 'I started to feel that it really wasn't working for clients and it was kind of, for me, it seemed to really represent pretty poor value for money… When clients are in a situation where they are paying sort of £250 an hour plus VAT, you know, quite a lot of clients were kind of reluctant to even pick up the phone to have the advice they needed.'

For many in our client sample, the security of knowing that a brief email exchange or reassuring telephone conversation was not going to add a huge amount to their bill made an important contribution to their overall satisfaction with the service provided. Undoubtedly it smoothed the way for the frequent and flexible communications that characterised the relationship for many and fueled the sense that the McKenzie Friend was a true ally.

The Distant Professional: what we know about family law practitioners (A)

In this section we revisit several studies of family lawyers, suggesting that they combine to highlight communication and connection with clients, along with case-management and costs, to be problematic. Although the studies we draw on took place over several decades, it is striking that the themes they identify map so closely onto the criticisms of lawyers expressed in our interviews. From this, we infer that much of what was revealed in the studies continues to hold true, at least among some practitioners. Further support for this inference can be derived from the fact that the Legal Ombudsman reports receiving more complaints related to family disputes than

any other type of dispute.[43] We address the recurring, if not dominant, themes of cost and case management first. We then move on to the more complex and nuanced matter of connecting and communicating with clients.

Cost (B)

A core theme emerging from both our client and McKenzie Friend interviews was the high cost of using regulated legal professionals. Although this resonates with anecdotal claims about disproportionately high legal costs in financial remedy cases, for example,[44] there is actually very little quantitative data available on the legal costs of divorce and separation. One recent report - Aviva's UK-wide *Family Finances Report* - suggests that average (median) legal costs incurred on divorce and non-marital separation are relatively modest, at £2,679 per person, although for a child residence dispute, this increases to £5,671.[45] However, this can be contrasted with *perceptions* of solicitor cost, perhaps exacerbated by the high costs incurred in atypical 'big money' and media-reported cases. In the Legal Ombudsman's review of divorce-related legal complaints, 27% of all complaints dealt with were reported to be cost-related.[46] The Legal Ombudsman's report suggests that one reason why costs can increase dramatically is that 'the emotional rawness of many of those going through divorce proceedings', noting that '[it is] common for them to rely heavily on the one individual who is both an expert in how to negotiate the process and who is seen to be on their side: their lawyer.'[47] This phenomenon was previously observed by Eekelaar et al, who described it as 'an expensive mistake to make'.[48] It is therefore unsurprising that our interviewees emphasised the combined affordability and approachability of McKenzie Friends in substantiating their narrative of 'useful difference'. The relational approach and flexible charging practices appear to give McKenzie Friends an advantage over lawyers in this regard.

Legal costs that come as a surprise to the client after an initial estimate – as described in some of the quotes above – were also highlighted in the Legal Ombudsman's report and in earlier studies. In Partisans and Mediators, Davis suggested that this was 'one particular area where it would appear that solicitors do not provide their clients with sufficient information, or alternatively, where they fail to convey this in such a way that it can be absorbed'.[49] By contrast, Eekelaar et al reported that family lawyers often go to great lengths to keep costs low, giving clients 'simple tasks' to complete themselves and sometimes suggesting they complete their own forms to avoid fees escalating

[43] Family disputes account for 18% of all complaints received. Legal Ombudsman, (2014) *The price of separation: Divorce related legal complaints and their causes*, 1, available at: https://www.legalombudsman.org.uk/downloads/documents/publications/The-price-of-separation-LeO-report.pdf, last accessed 28 September 2019.
[44] See correspondence between E Hitchings and J Miles, and Baroness Deech on this point, [2018] *Family Law*, 1251 (September issue) and 1358 (October issue).
[45] The first figure had doubled from the 2014 cost (£1,280). *Aviva Family Finances Report* (2018), 3-4. Available at www.aviva.com/content/dam/aviva-corporate/documents/newsroom/pdfs/newsreleases/2018/Aviva-Family-Finance-Report-The-hidden-cost-of-divorce-and-separation.pdf, last accessed 28 September 2019. A slightly older survey reported that the average mean individual legal cost for those experiencing a divorce legal need was £1300 per person, BDRC Continental, *Individual consumers legal needs report*, (June 2012), 99-100.
[46] Legal Ombudsman, n 43 above, 3.
[47] Ibid, 5.
[48] Eekelaar et al, n 22 above,
[49] Davis, n 1 above, 97 and 97-102.

unnecessarily.[50] While this does suggest that some are sensitive to the client's bank balance, it also points towards a tacit acknowledgement that the fees charged for mundane tasks are probably unpalatable and/or unaffordable for clients. Curbing costs by cutting services is also an approach that contrasts markedly with the flexible and generous approach to fee-charging that our McKenzie Friends and clients reported.

Overall, our findings appear to echo both Davis's concerns and the Legal Ombudsman's report. Even taking into account that our client sample is potentially skewed in favour of those with a positive experience of McKenzie Friends (and a correspondingly negative experience of solicitors), the warnings about fees being racked up in an unforeseen manner (to the client at least) should sound a warning to the legal profession about the need for greater transparency. There is also a question about the cost-appeal of family lawyers more generally. It might well be that post-LASPO, the more affordable services of some fee-charging McKenzie Friends are not simply an attractive option but are the only accessible option for poorer litigants. Furthermore, it seems apposite here to refer to Moorhead et al's benchmarks of cost, quality and access as the three dimensions along which claims to professional superiority should be judged.[51] When the professionals do all three better than non-lawyers, it is obvious they provide the superior service. If non-lawyers are cheaper – as some McKenzie Friends are perceived to be – and therefore more accessible, the equation is not so simple. The balance tips further still if it appears to litigants that lawyers offer less in the way of quality – whether interpreted as client care or unique expertise.

CLIENT CARE AND CASE MANAGEMENT (B)

Clients in our study reported being particularly impressed by the proactive communications and rapid responses to queries that they received from McKenzie Friends. There is some evidence to support the counter-experiences described by those who felt that solicitors had not exhibited the same client care ethos.

In *Simple Quarrels*, Davis et al gave a rather bleak account of family lawyers' case management practices. They described 'marked variation in the energy and efficiency displayed by legal advisers' and a culture in which solicitors 'do not monitor cases or "progress chase" and they are pretty relaxed about delays'.[52] Partly as a result of the distribution of workload among lawyers and clerks in most law firms, they suggested that cases 'do not always receive the continuity of treatment and firm strategic management which is desirable'.[53] They pulled no punches in relating that 'clients were consigned to a black hole of inactivity and stagnation from which some took years to emerge'.[54] Following this, their summation that 'solicitors struggle to maintain an ethos of service to the client' sounds rather understated.[55]

[50] Eekelaar et al, n 22 above, 192-194.
[51] Moorhead et al, n 19 above, 767.
[52] G Davis, S Cretney and J Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (OUP, 1994) 256.
[53] Ibid, 15.
[54] Ibid, 258.
[55] Ibid, 256.

Later, Eekelaar et al recognised family lawyers as typically 'reactive rather than strategic in planning work'.[56] This reality formed part of their persuasive debunking of the myth that family lawyers routinely and deliberately escalate costs. It also echoed Ingleby's finding that lawyers are too overloaded to plan for maximising profit, having a higher caseload than they can efficiently oversee at any given time.[57] Further, Sarat and Felstiner suggested that lawyers 'maybe so alienated, overworked, or worn down by practice that they do not have the patience or stamina to negotiate effectively with their clients'. [58] Though we cannot be sure of how pervasive sluggish case management is today, the views expressed in our study indicate that the problem does at least exist. Moreover, they are to some extent backed up by the Legal Ombudsman's finding that issues of quality and poor service underpin a large proportion of complaints related to matrimonial proceedings. These issues are said to include 'lack of care and attention' as well as 'lawyer's error and oversights'.[59]

Meanwhile, there is little evidence in the available research on family lawyers of the flexibility that seems to characterise McKenzie Friends' services. Eekelaar et al did allude to examples of solicitors holding meetings in a client's home and a hospital but these observations seem to stand out as an exception rather than a norm.[60]

CONNECTION PROBLEMS: THE 'SEPARATE SPHERES' OF LAWYER/CLIENT COMMUNICATIONS (B)

The Legal Ombudsman Report cited above identifies quality of service and cost as flaws in the work of some family lawyers. It links resolution of these problems to the longevity of family lawyers as a group, noting that this is a time of considerable change in 'the matrimonial market' and that 'the need for sensible cost estimates and regular updates throughout a case will become more pressing'. [61] Recent changes to encourage greater transparency in the costs of legal services do not yet apply to family work.[62] However, in this section we show that the literature on family lawyers suggests that compounding - and to some extent interacting with – client care and service quality issues are more deep-seated and complex problems. In particular, these problems are related to connecting and communicating with clients.

In their 1980s study of divorce lawyers in the USA, Sarat and Felstiner wrote of the tension created because family lawyers and their clients occupy 'separate spheres' of

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[56] Eekelaar et al, n 22 above, 59.
[57] R Ingleby, *Solicitors and Divorce* (Clarendon Press, 1992).
[58] A Sarat and W Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (OUP, 1998), 55.
[59] Legal Ombudsman, n 43 above, 7. Eekelaar et al suggested that in 8 out of 40 observed cases solicitors made errors that contributed to delay: n 22 above, chapter 8.
[60] Eekelaar et al, n 22 above, 70.
[61] Legal Ombudsman, n 43 above, 12. The Report seems to anticipate that the value clients attach to a face-to-face service when resolving family problems will continue to buoy the market for family lawyers (see 10-11). This, of course, does not account for the fact that McKenzie Friend type services often are face-to-face, and are more informal.
[62] The Solicitors Regulation Authority responded to pressure to require providers of certain types of legal services to publish clear information on their prices by introducing the new SRA Price Transparency Rules from December 2018: https://www.sra.org.uk/globalassets/documents/solicitors/sra-transparency-rules.pdf (last accessed 28 September 2019).

meaning, purpose and understanding.[63] While clients make sense of their family disputes by talking in terms of social relations and behaviour – the very fabric of family disputes – lawyers 'translate'[64] and edit their accounts to provide 'a professionalised understanding of the social world' that is firmly and exclusively focused on the legal.[65] Similarly, in the context of England and Wales, Davis et al wrote of the struggle that lawyers face to get clients to separate the legal from the emotional self. They found that the legal construction of a client's problem 'is in the nature of a 'snapshot' view of justice, lacking any historical or relationship dimension'.[66] Others have documented the friction inherent in the relationship between family lawyer and client as the former seeks to 'educate' or 'cool out' the latter to a legally acceptable standpoint.[67] Studies reveal at least three problematic consequences of the gap between the lawyer's concerns and the client's perception of what is important.

First, the lawyer's resistance to engaging with the client's emotion-laden account of the history and character of the relationship dispute can appear dismissive and indifferent. Sarat and Felstiner suggested that clients are engaged in a relational exercise when they present their version of events to lawyers: 'Clients work to penetrate the objectivity and reduce the social distance built into the traditional professional relationship. Their vocabulary serves to add sympathy to fees as a way to command their lawyers' energies.'[68] In *Simple Quarrels*, Davis et al reinforced this view with their observation that many family lawyers emphasise the professional nature of the lawyer/client relationship even as the client 'seeks to develop an empathetic sub-text, or perhaps even a dominant one'.[69] On this view, paying insufficient attention to the client's version of the story could be taken quite personally. Sarat and Felstiner paint the picture evocatively: 'Client and lawyer are like performer and bored, but dutiful, audience – the lawyer will not interrupt the aria, but she will not applaud much, either, for fear of an encore.'[70] When the impassive stance of the lawyer is pitted against the impassioned – even imploring – narrative of the client in this way, it is easy to imagine that a client might feel alienated. The 'separate spheres' within which the lawyer and client make sense of the family dispute express and sustain a professional distance that obstructs connection and makes it less likely that the client will experience the sense of having a true ally (or partisan supporter) that some McKenzie Friend clients report.

Secondly, there are indications that prioritising the legally relevant at the expense of heeding the social and emotional dimension of a family dispute can obstruct lawyers' understanding of clients' needs and even compromise the quality of legal representation. The main risk, as identified by Sarat and Felstiner, is that lawyers' 'understandings may be habitual and unreflective; they may uncritically subsume the particular within the general… lawyers may not be astute or attentive, or experienced

[63] Sarat and Felstiner, n 58 above, 6.

[64] The family lawyer's endeavour to 'translate' a client's case is described at length in Ingleby, above n 57, chapter 9 in particular.

[65] Sarat and Felstiner, n 58 above, 30.

[66] Davis et al, n 52 above, 53. This is echoed in research into residence and contact disputes by C Smart, V May, A Wade and C Furniss, *Residence and Contact Disputes in Court, Volume 2,* (Department for Constitutional Affairs Research Series 4/05, 2005),

[67] Mather et al, n 32 above, chapter 5 and endnote 10 in particular.

[68] Sarat and Felstiner, n 58 above, 50.

[69] Davis et al, n 52 above, 70.

[70] Sarat and Felstiner, n 58 above, 37

enough to catch the client's message'.[71] In other words, in the repeated, ritualistic sifting of legally relevant facts from emotion-charged chaff, lawyers may become blind or inured to details that matter to an individual client's case.[72] Mather made very similar observations following her study of family lawyers.[73] One reason this matters is because the relational and emotional dynamics that characterise the dispute might have a direct bearing on the feasibility of different approaches to negotiation with the other party, and on the sustainability of different outcomes.[74] It means that efforts to construct the best possible legal case end up deficient, as well as unrecognisable to the client. In such a situation it is easy to see why a client would not feel they benefitted from the sort of partisan support that amounts to someone fighting your corner.

The point can be illustrated by an unsettling story related by one of the clients in our interview sample. Over the course of the interview, she told us how her solicitor had encouraged her to mediate and negotiate with an extremely violent former partner, indicating that his requests for contact with their children (aged 1 and 2) were not unreasonable and would ultimately need to be complied with. At the First Hearing Dispute Resolution Appointment, CAFCASS adopted the same position. The interviewee had agreed to contact at a contact centre and to unsupervised contact at a public place, and attended a 'parenting course'.[75] She described her deep distress and sense of helplessness at the failure of both the solicitor and CAFCASS to respond to her warning that the ex-partner had changed his name and that searches of police records needed to be conducted against his former name. The McKenzie Friend whose services she switched to made her feel listened to and helped her to collect and present in court important evidence about her ex-partner's behaviour. Ultimately his application for contact was unsuccessful.

The experience described above is a perfect example of Carol Smart et al's finding that many litigants in private children cases 'felt that they were not being listened to… and that they might as well have been on a conveyor belt'. [76] Lawyers are, of course, key arbiters of clients' experiences and understanding of family justice; they are an intrinsic part of the system, compared with McKenzie Friends who operate as system outsiders. Dissatisfaction with an impersonal experience will inevitably land on the lawyer to some extent. But there is a bigger problem here. A client who feels distant from an outcome they perceive to be impersonal is also likely to project their dissatisfaction onto the law and the justice system itself. Hence Smart et al found that the sense that a sufficiently personalised outcome had not materialised left many litigants feeling 'cheated'.[77]

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[71] Ibid, 55. On a general level this observation brings to mind Avrom Sherr's research finding that the interviewing skills of many lawyers leave much to be desired: A Sherr, 'Lawyers and Clients: the first meeting' (1986) 49 *Modern Law Review* 323.

[72] An example of this can be seen in research evidence highlighting the tendency for legal professionals to downgrade domestic violence and risk concerns when dealing with post-separation arrangements for children. For an overview of the literature, see R Hunter, A Barnett and F Kaganas, 'Introduction: contact and domestic abuse' (2018) 40(4) *Journal of Social Welfare and Family Law*, 401, 404-406.

[73] L Mather, 'What do clients want, what do lawyers do?' (2003) 52 *Emory Law Journal* 1065.

[74] Sarat and Felstiner, n 58 above, 51.

[75] Assumed to be the Shared Parenting Information Programme.

[76] Smart et al, n 66 above, 26.

[77] Ibid, 28.

In addition to potentially obstructing the lawyer's ability to absorb important information *from* the client, the legal-centric approach of family lawyers can work in the opposite direction, impeding the effective transmission of information *to* the client. The recent Legal Ombudsman report found that the key issue prompting the 18% of divorce-related complaints about inadequate legal advice was a 'poor standard of information provided to the customer'.[78] Related to, but more nuanced than, this conclusion is an abundance of evidence from past studies that suggests family lawyers often fail to communicate the law to their clients effectively.

Davis et al explain how failure to invest in giving clients explicit updates and explanations of the law, legal reasoning and legal process interacts with the tendency to side-line what is emotionally relevant to the client without explanation. The consequence is not only 'effectively to bury a major component of the parties' perception of the justice of their case'[79] throughout the process, but to leave parties 'disconnected' from the outcome too; because the outcome bore no relationship to clients' perceptions of justice or the conduct of the parties, clients misunderstood the reasons for outcomes and felt detached from them.[80] This finding mirrors Sarat and Felstiner's claim that the legal-centric approaches of most family lawyers results in an unbridged gap between the understanding of family justice held by the client and the lawyer; the 'separation of spheres remains unresolved, even following a prima facie positive outcome. In their view, the lawyer and client 'travel along different and separate trajectories throughout the case'. [81] Consequently, in the absence of identification with the lawyer's version of events, the client insists on 'maintaining their own interpretive scheme'. [82] This is one of the key explanations for Sarat and Felstiner's central thesis – that, in relation to divorce, 'lawyer-client relations are sites of conflict and negotiation'[83] in which lawyers must repeatedly spend time 'orienting and reconciling clients to the world of the legally possible'.[84]

There are multiple problems with this situation. On a prosaic level, it should be of concern because it generates inefficiencies that are likely to escalate costs, hampering perceptions of good service and disrupting any sense of having a dedicated, partisan supporter. More significantly, it indicates that lawyers sometimes fail to communicate the very essence of their professional expertise. As Eekelaar et al said, a lawyer's 'starting point must be… making the law a reality for their clients. For the primary commodity they have to offer is their legal knowledge'.[85] Davis et al also pointed out that a solicitor's authority might derive from how well they are able to convince the client of their expertise, which is partly about explaining things in a way they understand.[86] Inability to do this plays directly into the hands of those seeking to assert the relative insignificance of professional legal expertise in family disputes.

[78] Legal Ombudsman, n 43 above, 7.
[79] Davis et al, n 52 above, 56.
[80] Ibid, 54-55.
[81] Sarat and Felstiner, n 58 above, 83.
[82] Ibid, 30.
[83] Ibid, 142.
[84] Ibid, 53.
[85] Eekelaar et al, n 22 above, 182.
[86] Davis et al, n 52 above, 89-90.

Importantly, however, we have suggested in this section that the stakes are higher still. The 'separate spheres' in which lawyer and client operate are likely to leave clients feeling distant from and dissatisfied with the law as well as the lawyer.[87] Where the outcome of a dispute is experienced not only as *impersonal* but also as unfathomable in terms of lacking any discernable legal foundation, the sense of alienation is likely to be compounded. Mather et al summarised the concern neatly:

> 'a lot of what lawyers' do is translate the law for the client – make it socially meaningful. The role of lawyers in this endeavor is significant as it contributes to shaping of mass legal consciousness and promoting or undermining the legitimacy that the public attaches to legal institutions.'[88]

BUT WHAT ABOUT 'THE HYBRID PRACTITIONER'? (B)

It might be retorted that the above analysis does not account for the trends in modern practice observed in later studies of family lawyers. Davis and Pearce, for example, asserted that family lawyers increasingly 'embrace the counsellor element of their role…commonly spending more time listening to their clients than they can comfortably charge for, and giving advice of a psychological as well as a legal character'.[89] Eekelaar et al similarly found that providing reassurance and support was central to family lawyers' work.[90] What are these authors describing, if not the very same empathetic and supportive approach that clients in our research claimed their McKenzie Friends had provided? Surely the scaffold of 'professional distance' and 'separate spheres' has been broken down by such practice norms? On closer inspection, however, it is by no means clear that the shift towards settlement and support would have improved the connection between family lawyers and their clients.

To begin with, Davis and Pearce recognised that family lawyers might not be very effective in their new roles, 'given that lawyers' training (as distinct from their subsequent experience) provides them with insights into family dynamics which need be no more profound than those of plumbers or dentists'.[91] But they also alluded to a more systemic problem, namely that these norms developed in the context of – even because of – a strong settlement culture. True, a well-developed settlement orientation is likely to bear all the hallmarks of sophisticated communication techniques. As Davis and Pearce said, family lawyers have had to acquire and deploy new client handling skills, 'to cajole, encourage, mollify, to break down and then to build up'.[92] But they also identified a 'downside' of the 'hybridity' exhibited as family lawyers used skills and techniques more commonly associated with CAFCASS, mediators and other family justice professionals:

> Arguably, it is when professional roles and responsibilities merge that lay people are most vulnerable to professional power. This is because only the professionals understand what is going on. The conduct of s 8 applications

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[87] On this, we adopt a more nuanced position than Ingleby, who took the position that, 'For the client, the rules are personified in the solicitor and it is the solicitor, rather than the rules, who has failed to meet demand.' Ingleby, n 56 above,139.
[88] Mather et al, n 32 above, 86.
[89] G Davis and J Pearce, 'The Hybrid Practitioner' [1999] *Family Law* 547, 550.
[90] Eekelaar et al, n 22 above, especially chapter 5.
[91] Ibid, 550.
[92] Ibid, 557.

> [under the Children Act 1989] is, as far as parents are concerned, rather mysterious… Hybridity means that practitioners lose their clear identities – identities which parents may initially believe that they know and understand.[93]

Far from engendering greater connection between lawyer and client, the new way of practising just might intensify a client's sense that they stand distant from an amorphous monolith of professional consensus that they cannot quite identify or comprehend. And this is not simply a matter of perception. The family lawyer's commitment to a client's goals was probably always tempered by competing loyalty to professional norms.[94] But the standardised patterns of case progression and outcomes that characterise a settlement culture are likely to have shifted the balance more towards the latter. This is likely to increase perceptions of impersonal 'conveyor belt' experiences.

To put this another way, an inherent part of settlement culture is a dilution in the partisanship that Davis argued was central to the value and distinctive identity of family lawyers.[95] Indeed, Mather has chronicled ample evidence to suggest that it is a mistake to think of family lawyers as lawyers in the classic partisan tradition precisely because family dispute resolution norms result in lawyers positioning themselves more as independent advisors than agents of their clients.[96] Let us now consider Davis' analysis of the interaction between empathetic communication and partisanship:

> 'Qualities which do not in themselves imply partisanship, such as a willingness to listen, or being 'down to earth'… need to be provided within a framework of unambiguous partisanship… It is not possible to separate sensitivity and understanding on the one hand from partisanship on the other; in many people's minds the two things go together.'[97]

On this view, the efforts to be supportive and attentive that infuse contemporary practice and are lauded by Eekelaar et al, might very well miss their mark. The trust engendered by a true partisan, or ally, operates as a necessary precondition for receiving support. The attraction to McKenzie Friends – who are untrammelled by obligations to the norms of a community of practice fixed within the formal legal system – described by the clients in our study begins to make a good deal of sense. All the more so since the soft skills that characterise the modern approach to family law practice also dilute any claim to unique professional expertise on the part of lawyers.

A conundrum has emerged here and it takes us back to our opening discussion about challenges to the expertise of family lawyers. A significant 'useful difference' that McKenzie Friends appear to offer to clients is their ability to form close connections

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[93] Davis and Pearce, above n 89, 557.

[94] The influence of the 'community of practice' on the shape of the practices of divorce lawyers generally was a key theme emerging from Mather et al's study, above n 32.

[95] Contemporary academic commentary is replete with other cautionary analyses of the effects of settlement culture. See, for example, Diduck, n 30 above; L Smith and E Trinder, 'Mind the gap: parent education programmes and the family justice system' [2012] 24(4) CFLQ 428; E Hitchings, 'Official, operative and outsider justice: the ties that (may not) bind in family financial disputes' [2017] 29(4) CFLQ 359.

[96] Mather, n 73 above.

[97] Davis, n 1 above, 90.

with their clients. We have argued that these connections have been difficult for family lawyers, as professionals focused on the law, and constrained by normal business practices, to achieve. We have presented reasons to suggest family lawyers do need to be attuned to the affective dimension of what they do, and that attention to the affective dimension might even be a prerequisite of communicating the law. And yet, in developing or emphasising the affective dimension of their work, it seems they fuel perceptions of their own redundancy. For what is the need for an expensive lawyer, if the main substance of their work comprises skills that are essentially interpersonal and relational and therefore almost universal?

As Davis and Pearce put it:

> 'once lawyers find it necessary to take account of the long-term interests of children, or of the parties' future relationship, then divorce as a legal process is called into question, because this is not legal knowledge. If lawyers' partisanship has to be tempered by considerations born of child psychology, or even family therapy, one is bound to ask why they (and in particular, why solicitors) should continue to occupy such a dominant position'.[98]

Concluding thoughts (A)

This article set out to situate our qualitative data revealing why McKenzie Friends might appeal to those with a family dispute in the context of a range of studies that have examined the working practices of family lawyers. We have found credible evidence and commentary to sustain the view that McKenzie Friends are able to outperform lawyers on certain measures that are important to those seeking help with a family dispute. Constrained by neither an obligation to observe the settlement norms that prevail within the family law profession,[99] nor the fee-charging conventions and business practices of a law firm, McKenzie Friends are able to offer a genuinely partisan service on an attentive and affordable basis. By contrast, sub-optimal cost and client care practices have been identified as factors underpinning cynicism about the value of family lawyers. Those issues should undoubtedly be addressed. But in light of the literature on how family lawyers work, we have taken the view that they are peripheral to a more fundamental question. That is, whether family lawyers communicate or 'connect' with their clients to the extent that is expected and required given the intensity of the circumstances in which their support is sought. If they do not, their legal expertise – the hallmark of their professionalism – might well get lost in translation.

On one reading then, this article constitutes a challenge to orthodox beliefs in the innate superiority of family lawyers and the corresponding inadequacy of fee-charging McKenzie Friends. Though we make no general, population-level claims about the relative quality of McKenzie Friends vis-à-vis family lawyers, we do take the view that the case for championing or denigrating the role of either must be thoughtfully made

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[98] Davis and Pearce, n 89 above, 121.

[99] See Davis et al, n 52 above; E Hitchings, J Miles and H Woodward, *Assembling the jigsaw puzzle: Understanding financial settlement on divorce,* (Bristol University, 2013); A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times,* (Palgrave, 2017).

rather than unquestioningly assumed. Our study does not provide an evidential basis for concluding that using a McKenzie friend is in fact better for a client than using a lawyer; robust evidence on how McKenzie Friends affect *outcomes* for the clients is still needed. But we did find grounds for suggesting that McKenzie Friends are less harmful than is often supposed and might also provide services of some value.

However, we also share the Legal Ombudsman's view that there are prima facie benefits to the consumer in being able to access the services of a regulated, qualified and experienced family lawyer. Those benefits make a strong case for taking steps to shore up the future market for family lawyers by strengthening its value and appeal to consumers. Here, we wish to reiterate our argument that the importance of doing this goes well beyond securing the buoyancy of the professional legal services market. A key task of family lawyers is to explain the principles of family law and guide clients through complex family law procedures. This means that the perceived reliability, sense and value of the whole family justice system is implicated in the ability of family lawyers to connect and communicate effectively with their clients.[100] This is why – as we indicated in our introduction – one of our objectives in writing this piece was to identify possible ways of challenging the myth that family lawyers are unnecessary. By scrutinising the 'useful differences' claimed by McKenzie Friends and their clients, we have highlighted the possibility that it is only by succeeding in communicating concern for and understanding of clients' situations that lawyers establish the foundations for success in communicating the law.

And so we return to the identified conundrum in which the soft empathetic skills required to bring about that connection with clients simultaneously eclipse the image of the family lawyer as a purveyor of unique legal expertise. Although the conundrum arises from family lawyers operating within professional norms and culture, it is not inescapable. In *Simple Quarrels*, Davis et al reported rare examples of legal practitioners who were able to 'pull off the three-card trick' of adopting the 'highly circumscribed partisanship'[101] that follows emphasis on settlement, while bringing clients along with them. Operating with 'considerable subtlety and sophistication',[102] these practitioners were said to make careful efforts to rationalise the law's stance in order to bring clients round to accepting a compatible position. Emphasis on communicating the law was key, but it was not sufficient: 'the style reflected an authority which was as much personal as legal. This was manifested in activity and in a willingness to explain.'[103] Through the magic ingredients of attentive support, excellent communication and swift action, this sub-group of family practitioners appeared able to bridge the professional distance between them and their clients.

In concluding, we venture to suggest that greater efforts should be invested in enabling a far wider set of family lawyers to cultivate this 'rare' skill set. One possible way out of the conundrum lies in family lawyers becoming professional communicators, adept at both connecting with clients and communicating their legal expertise. The acquisition of such a crucial element of good family lawyer services should not be left

[100] This is reminiscent of Dewar's view that family lawyers provide the 'stabilising practices of interpretation' that give family law coherence and meaning. J Dewar 'The Normal Chaos of Family Law' [1998] 61(4) *Modern Law Review* 467.
[101] Davis et al, n 52 above, 83.
[102] Ibid, 259.
[103] Ibid, 86.

to the rare chance possession of an innate ability. Rather, professional training and development should be refreshed so that all family lawyers might exhibit it. In addition to legal expertise, family lawyers could then lay claim to expert techniques – cultivated through specialist training and development – for helping clients understand their legal position *and* making them feel comfortable with a stressful process. Such training would mean that efforts to assist clients in the mechanics of dispute resolution could be presented as functions of an enhanced rather than a diluted professionalism. It might also help to resolve a challenge that, as Mather acknowledged, family lawyers wrestle with alone because professional codes and training provide little guidance on how much emotional support they should provide, and how they should provide it.[104]

As academics we do not claim to know exactly what training along these lines would entail. It seems likely that exposure to the tenets of other disciplines, such as communications and psychology, would be involved and that a more complex form of multi-disciplinary professionalism would result. Such an approach would not be at all unprecedented; medical students, for example, often undertake some study of sociology and other disciplines that are tangential to their subject but have the potential to improve their capacity to deploy their medical knowledge and discharge their responsibilities in practice. We suggest that this approach could enable family lawyers to trump the McKenzie Friend claim to function as a perfect partisan and to demonstrate more effectively their genuine legal expertise. It would not improve access to family lawyers in the post-LASPO environment (only a radical – and unlikely – shift in legal aid policy or law firm fees could achieve that). However, it might provide a basis for persuading clients, and even policy makers, that family lawyers possess enough unique professional value to justify future investment.

[104] Mather, n 73 above, 306.